standing as an advocate and solicitor, but it would appear to me that defendant has, and was entitled to, put before the Court the agreement. Otherwise the pleadings could not be characterised as frank and would not disclose the true position to the Court. Resulting from this, defendant has (whether justifiably or not the Court is not yet in a position to judge) made a claim in respect of this agreement, and he should not be jeopardised by the error of plaintiff's counsel. I, of course, make no comment on the merits or otherwise of defendant's claim that the agreement is void. This claim will have to abide trial. Counsel asked how could prejudice arise when the amount is reduced, but this argument appeared to me to be lacking in strength when, in the circumstances of this case, the prejudice to the defendant arose out of the very fact that defendant's case was based on the facts of the original claim and that the reduction of the amount *ipso facto* caused the disappearance of the defendant's case.

How, then, stand the authorities?

Odgers on Pleading and Practice, 15th edition, page 167 states:—

"As a general rule either party is allowed to make any such amendment as is reasonably necessary for the due presentation of his case" (and I would stress the words "his case") "on payment of the costs of and occasioned by the amendment provided there has been no undue delay on his part" (in the present case, having regard to the time which elapsed before the application to amend, such application cannot in my view be characterised as a prompt one, although this may not be fatal to the application) "and provided also the amendment will not injure or affect any vested rights of his opponent."

In my view the proposed amendment will injure defendant's vested rights for the reasons above stated.

In *Clarapede v. Commercial Union Association*,[3] Brett, M.R., says:

"However negligent or careless might have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but if the amendment will put them into such a position that they may be injured it ought not to be made."

I would say that the amendment ought not to be made because defendant may be injured by it. *Odgers* continues that if the application be made *mala fide* or if the proposed amendment will cause undue delay or will in any other way unfairly prejudice the other party, or is irrelevant or useless or would raise merely a technical point leave to amend will be refused.

In my view in this case allowance of the amendment would occasion unfair prejudice to the defendant for the reasons already given.

Odgers further states that where the action has been brought on a substantial cause of action to which a good defence has been pleaded the plaintiff will not be allowed to amend his claim by including in it for the first time a trivial or merely technical cause of action which such defence may not cover. Annual Practice 1956, p. 459 states that the Court will refuse to allow an amendment where the amendment would change the action into one of a substantially different character which would more conveniently be the subject of a fresh action or where a claim has been abandoned.

In *Raleigh v. Goschen*[4] at p. 81 Romer, J., states:

".....and the only further question I have to consider is whether I ought to give the plaintiff leave to amend as asked by them. On consideration I think I ought not; for what the plaintiffs are seeking to do is to change one action into another of a substantial character. Apart from the fact that the present action cannot be sustained, while the other might lie, an action against the defendants in their official capacity, supposing it to lie, would differ in most material respects from an action against them as individuals....."

After considering the relevant authorities I have come to the conclusion that the application to amend should, in the exercise of my discretion (see *Australian Steam Navigation Co. v. William Howard Smith & Sons*[5]) be refused with costs to the defendant in any event. In my view prejudice would result to the defendant were the amendment to be allowed.

Application refused.

Solicitors: *Donaldson & Burkinshaw*; *Mitra & Co.*

MOHAMED DAUD BIN HAJI MOHAMED TAHIR v. HABIBAH BINTI BADU RAHMAN & ORS.

[O.C.J. (Good J.) March 5, 1958]

[Ipoh — Probate Suit No. 1 of 1957]

Probate and Administration — Matter started as a petition for letters of administration — Entry of caveat — Uncontentious business becoming contentious matter — Petition converted into contended probate suit — Failure to renew caveat — Effect of — Rules for Non-Contentious Business in the Supreme Court in its Probate Jurisdiction (G.N. No. 2179/16 as renumbered by G.N. No. 2096/27), rr. 54 and 55.

This case arose out of a grant of letters of administration by the Senior Assistant Registrar to the petitioner on July 30, 1956, against which order there was no appeal, but the defendants applied by way of notice of motion for the setting aside of the order and the fixing a date for hearing the petition. The motion came before Pretheroe J. who on September 17, 1956 set aside the Registrar's order and further ordered that the Registrar should fix a date for hearing of the petition for the applicants to state their case. What had, up to then, been uncontentious business on the probate suit thereby became a contentious matter, and the proceedings became as it were converted from a non-contentious petition for letters of administration into a contended probate suit which commenced with the issue of a summons on January 8, 1957. In the meantime a caveat had been lodged by the present defendants which, however, expired on July 7, 1957, and was not renewed.

In the course of the proceedings of the suit, counsel for the plaintiff took the preliminary point that the defendants were precluded from defending it by reason of the fact that the caveat, which had expired, had not been renewed and that they no longer had any standing in proceedings of that nature.

Held: (1) once the caveat lapsed through the failure of the caveator to renew it within six months, the business in respect of which that caveat was lodged automatically ceases to be contentious. The provision of rule 55 of the Rules for Non-Contentious Business in the Supreme Court in its Probate Jurisdiction is that the caveat shall expire and be of no effect;

(2) reading both rules 54 and 55 together the clear intention is that the business in respect of which the caveat was entered is no longer to be treated as contentious business;

(3) the defendants having failed to keep an effective caveat in force are precluded from opposing the grant of the letters of administration.

Case referred to:—

(1) *Moran v. Place*, (1896) P. 214, 216.

PROBATE SUIT.

K. C. Chan Jr. for the plaintiff.

A. S. Yeo for the defendants.

Good J.: I will give an oral ruling on the point which was raised by counsel for the plaintiff, and argued before me this morning. But in the event that the unsuccessful party might wish to appeal against this ruling, I have directed that it be taken down by my Secretary.

This matter started as a petition for letters of administration before the Senior Assistant Registrar who granted letters of administration to the petitioner on the 31st July, 1956. That order of the Senior Assistant Registrar was not appealed against and the next step that was taken in the matter was an application by the present defendants by way of notice of motion for the setting aside of the Senior Assistant Registrar's order of the 31st July, 1956, and the fixing of a date for hearing of the petition. The motion came before my predecessor, Mr. Justice Pretheroe, and by an order dated 17th September, 1956, he ordered that the Registrar's order of the 31st July, 1956, be set aside and he further ordered that the Registrar should fix a date for hearing of the petition for the applicants to state their case. What had, up to then, been uncontentious business on the probate suit thereby became a contentious matter, and the proceedings became as it were converted from a non-contentious petition for letters of administration into a contended probate suit which commenced with the issue of a summons on the 28th January, 1957. In the meantime, on the 8th January, 1957, a caveat had been lodged by the present defendants which, however, expired on the 7th July, 1957, and was not renewed.

The proceedings which came before me this morning were the Probate Suit No. 1 of 1957 but Mr. Chan for the plaintiff took the preliminary point that the defendants were precluded from defending the suit by reason of the fact that the caveat, which had expired, had not been renewed and that they no longer had any standing in proceedings of this nature. On this preliminary point, the only question, it seems to me, to be decided is what is the effect of the failure to renew a caveat upon a suit which has already commenced i.e. what is the effect of the absence of a caveat *pendente lite*.

I have made exhaustive researches to find an authority on this particular point. I am as nearly satisfied as it is possible to be that there is no Malayan authority on this precise point. The only case that I can find which deals at all with caveats in probate and administration matters does not answer this particular question and, so far as I have been able to discover, there is unfortunately no English authority on this precise point. The position which arises when a petition for letters of administration is contended is very clearly set out in the judgment of Lord Justice Lindley in *Moran v. Place*[1]. The case, as I have already indicated, does not deal with this precise point, but I think it may help to an understanding of what the considerations are that must affect the decision on the point if one looks at the passage from Lord Justice Lindley's judgment in which he expresses his views on the nature of a caveat in these cases. This is what he says:

"A caveat is not a notice to any opponent in particular. It is a notice to the registrar or officer of the Court not to let anything to be done by anybody in the matter of the will, or the goods of the deceased, without notice to the person who lodges the caveat. It

is impossible to look at it as commencing any litigation — it merely requests the registrar to tell the caveator if anybody stirs in this matter. That caveat having been entered and there being an address so that the person entering it can be found, the next thing is that somebody does begin to stir in the matter. That is the present plaintiff, who is the executor of the will and wishes to prove it. When a caveat has been entered the person who wishes to prove the will has to warn the person who entered the caveat, and if such person, i.e. the caveator, intends to make any real objection, he enters an appearance. Then, if the litigation goes on, the person who wants to prove the will issues a writ and serves it on the caveator. Then, and not before, there is litigation between the person propounding the will on the one side, and the person opposing it on the other."

I have asked myself the question: is the continuance of the caveat a condition precedent to the defending of the suit by the defendants in a probate suit such as this, or is the purpose of the caveat merely to enable a person desiring to oppose the grant of probate, or as in this case letters of administration, to have notice of any steps that may be taken by the person petitioning for probate? In other words, is the position something like this — that the person desiring to oppose the grant of probate deprives himself, by failing to renew the caveat, of his right to have notice of all steps taken thereafter. If this is the position, it would follow that the caveator, though deprived of the right to further notice after the expiration of the caveat, is not necessarily precluded from defending the action if, in fact, he is served with the necessary papers at the various steps in the proceedings and comes before the Court in the role of defendant.

In the absence of English authority, I hesitate to propound from this Bench what I think is the law in England on this point. But it seems to me that the law may be that the failure to renew the caveat in England is not necessarily fatal to the caveator's position when the probate suit comes on for hearing. However, the provisions of the relevant rule in England are quite different from the provisions of the corresponding rule in this country. Rule 44(1) of the Non-Contentious Probate Rules, 1954, reads as follows:

"Any person who wishes to ensure that no grant is sealed without notice to himself may enter a caveat in any registry."

and sub-rule (6) reads:

"The registrar shall not allow any grant to be sealed if he has knowledge of an effective caveat thereof."

It is quite clear what the intention of these provisions is. I do not think it is necessary to read the rest of them. The intention clearly is to enable the caveator to have notice so that he can take steps to prevent the Court from making, or rather to persuade the Court not to make, a grant. But I don't think that there is anything in this rule which would necessarily appear to preclude the caveator, even if his caveat has lapsed, from defending the action if the plaintiff waiving his rights in the matter continued to treat the caveator as a defendant, and went on with his action against him in the role of defendant.

However, when we turn to *Halsbury's* Laws of England, 2nd Edition, Volume 14 at page 186 we see that the learned author has made a somewhat different statement of the law. This, of course, was written before the 1954 Rules and it may be that the law was different at the time when this commentary was written. I do not think that for the purpose of the present case that matters. The learned author of *Halsbury* says:

"A person who intends to oppose the issuing of a grant of probate or letters of administration must either personally or by his solicitor enter a caveat in the principal registry or in a district registry.

A caveat, which may be entered by any one having or asserting an interest in the estate, remains in force for six months only, but may be renewed from time to time. No grant can be sealed while the registrar has knowledge of an effective caveat."

That statement of the law in the year 1934 is nearer to the provisions contained in our own rules and, as I say, it may well be that there has been a change in the law in England in the 1954 Rules and my *obiter* observations on what may be the position in England are related to the provisions of the 1954 Rules. But I think that the only available means of solving the point which has been raised in the present proceedings is, in the absence of precedent, to look at our rules and attempt to interpret them *de novo*.

The relevant rules in the Rules for non-contentious business in the Supreme Court in its probate jurisdiction, which were published as Gazette Notification 2179 of 1916 and thereafter from time to time amended, are the rules now numbered 54 and 55 cited by Mr. Chan as 55 and 56 (but they were renumbered in 1927) which rules read:

"54. Any person intending to oppose the issuing of a grant of probate or leters of administration must either personally or by his solicitor or attorney enter a caveat in the Principal Registry or in the proper District Registry; if in the Principal Registry, the person entering the caveat must also insert the name of the deceased in the index to the caveat book.

55. A caveat shall bear date on the day it is entered and shall remain in force for the space of six

months only, and then expire and be of no effect; but caveats may be renewed from time to time."

That is very close in wording to the words that I read from *Halsbury* but different from the wording of the 1954 Rules in England, and it seems to me that the two rules, our rule 54 and the English rule 44 of 1954, may well have been designed to serve different purposes. The English rule would appear to be designed either exclusively or primarily for the purpose of ensuring that the caveator being a person interested in opposing a grant of probate has due notice of all steps taken in the matter by the petitioner without necessarily making the lodging of a caveat and the existence of an effective caveat a condition precedent and a necessary prelude to the defending of the proceedings. On the other hand, it appears to me that our rule as framed is designed with the intention of making the entering of a caveat a condition precedent to the opposing of the issuing of a grant of probate or letters of administration. The purpose of these rules appears to me to be to keep non-contentious business non-contentious, and to ensure that where business on the probate side appears to be contentious it really is so: to make arrangements, in other words, for all non-contentious business to go through the non-contentious machinery of the Court and to restrict the use of the contentious machinery to cases which are really contended. And for that purpose it seems to me the rules have provided that a caveat must be entered by any person intending to oppose the issuing of a grant and that a caveat shall remain in force for the space of six months only. It seems to me, therefore, that once the caveat lapses through the failure of the caveator to renew it within six months, the business in respect of which that caveat was lodged automatically ceases to be contentious. The provision of rule 55 is that the caveat shall expire and be of no effect.

In my view, reading these two rules together, the clear intention is that the business in respect of which the caveat was entered is no longer to be treated as contentious business. In short, the caveator, in my view, loses his right to contend the suit — to oppose the issuing of the grant.

In reply to Mr. Chan's point, Mr. Yeo argued that this matter had already been disposed of by Mr. Justice Pretheroe in his order of the 17th September, 1956. He did not use the phrase *res judicata* but in effect that was what he submitted; that the point had been decided and that Mr. Justice Pretheroe's order directs the fixing of a date for hearing of the petition for the applicants to state their case and that this objection cannot in the light of that order now be taken. I am afraid that I must disagree there. It is true that in his answering affidavit dated 29th August, 1956 the plaintiff said this:

> "I say that the applicants are not entitled to set aside the Order dated the 31st day of July, 1956. The applicants became aware of the said Order within an hour's time after it was made. The remedy for them was to have appealed against it if at all they were really dissatisfied with it but they have not done so and I am therefore advised and will accordingly object to the present application by the applicants. If the applicants had the intention of objection to my petition for letters of administration, they should have entered caveats against my petition in terms of Notices of Hearing of Petition served on them by Court in good time, as I have in paragraph 5 hereof explained, calling for objection and lodging of caveats by those willing to object. The applicants have not done so and they have no right to be heard."

It seems to me that the very fact that no caveat had at that date been entered makes all the difference in the world between the position when the matter came before Mr. Justice Pretheroe and the position now where a caveat was entered and has been allowed to expire. I am not prepared to say whether I agree or disagree with my learned predecessor's method of disposing of the matter as it came before him. I do not know whether, if I had been in his position, I would have made an order setting aside the grant by the Senior Assistant Registrar and directing that a date be fixed for hearing of both sides on the petition. It is not necessary to go into that question now. Whether the learned Judge was right or wrong, the fact is that these proceedings have come before me in the form of a probate suit and when they do come before me there is no effective caveat, the caveat entered having been allowed to lapse.

I therefore hold that the question now before me was not decided by Mr. Justice Pretheroe. It had not arisen at the time when the notice of motion came before him, no caveat having been entered at that date, and I am dealing with a point quite different from the point raised in paragraph 12 of the affidavit which I have just read.

That I think disposes of Mr. Yeo's reply to Mr. Chan's preliminary point.

On the preliminary point itself, I regard myself as bound by what I conceive to be the effect of rules 54 and 55 of our non-contentious business rules, and my ruling is that the defendants having failed to keep an effective caveat

in force are precluded from opposing the grant of letters of administration. It follows that my order in this matter must be a direction that letters of administration do issue to the plaintiff.

Unless counsel has anything to urge on the question of costs, I am inclined to think that the costs of these proceedings should be paid by the unsuccessful defendants.

Order accordingly.

Solicitors: *K. C. Chan; A. S. Yeo.*

S. M. AMEER BATCHA v. V. K. KUNJUMON

[A.C.J. (Sutherland J.) March 6, 1958]

[K.L. — Civil Appeal No. 24 of 1957]

Societies Ordinance, 1949, s. 2(e) — Koottu (Chit Fund) — Whether an Association — Illegality — Administration of funds.

In this case the plaintiff Ameer Batcha claimed that in November, 1955 he started a *koottu* with ten tickets and a capital of $1,000, each ticket holder subscribing every month $100. The subscriptions were pooled every month and the prize money paid to the lowest bidder, the difference between the pool amount and the bid amount being distributed as premium to the subscribers. Defendant was the successful bidder in February, 1956 and the prize money was paid to him by the plaintiff. Since April, 1956 defendant failed to pay the subscriptions due by him, such subscriptions less the premium amount payable to him amounting to $489.40 and plaintiff prayed judgment for this sum of $489.40.

Defendant pleaded that not having in any way been concerned in the *koottu* as alleged defendant was not liable. Alternatively defendant averred that the plaintiff was not entitled to recover as the *koottu* not being registered was an illegal society.

At the hearing it was contended on behalf of the defendant that the *koottu* based on ten subscribers not being registered was an illegal society under the Societies Ordinance. It was not registered under any Ordinance. It was submitted on behalf of the appellant that even if the society was illegal, the object of the society and the contract between its members may well give rise to civil rights and obligations.

The learned Magistrate, agreeing with the submission of the defence counsel, dismissed the suit. The plaintiff appealed.

Held: (1) *koottu* in this case was not carried on for the purpose of the *koottu's* profit, and therefore not carrying on business so as to bring it within exception (e) of the definition of society in section 2 of the Societies Ordinance, 1949;

(2) *koottu* in this case was illegal and does not fall under exception (e) of the definition of society in section 2 of the Societies Ordinance.

Cases referred to:—

(1) *Smith v. Anderson,* (1880), 15 Ch. D. 247.

(2) *Ramasamy v. Muniappan,* (1940) M.L.J. 290.

(3) *Greenberg v. Cooper-Stein,* (1926) Ch. 657.

(4) *Jennings v. Hammond,* (1881-82) 9 Q.B.D. 225.

(5) *Shaw v. Benson & Ors.,* (1882-3) 11 Q.B.D. 563.

(6) *Wilkinson v. Levinson,* (1925-26) T.L.R. 97.

MAGISTRATE'S APPEAL.

P. P. Nair for the appellant.

Chan Hua Eng for the respondent.

Sutherland J.: In this case plaintiff claimed that in November, 1955 he started a *koottu* with ten tickets and a capital of $1,000, each ticket holder subscribing every month $100. The subscriptions were pooled every month and the prize money paid to the lowest bidder, the difference between the pool amount and the bid amount being distributed as premium to the subscribers. Defendant was the successful bidder in February, 1956 and the prize money was paid to him by the plaintiff. Since April, 1956 defendant failed to pay the subscriptions due by him, such subscriptions less the premium amount payable to him amounting to $489.40 and plaintiff prayed judgment for this sum of $489.40.

Defendant pleaded that not having in any way been concerned in the *koottu* as alleged defendant is not liable. Alternatively defendant averred that the plaintiff is not entitled to recover as the *koottu* not being registered was an illegal society.

At the hearing counsel for defendant pursued the defence submission that the *koottu* based on ten subscribers not being registered was an illegal society under the Societies Ordinance. It was not registered under any Ordinance. Counsel cited certain authorities, which plaintiff's counsel contended had no application. Plaintiff's counsel urged that civil rights cannot be denied.

The learned Magistrate, agreeing with defence counsel, dismissed this suit, whereupon plaintiff appealed on the grounds set out in his memorandum of appeal.

At the hearing of the appeal appellant's counsel contended that the *koottu* is not a society. He cited the Societies Ordinance, 1949, section 2. Society includes a club, company, partnership or association. The members of the *koottu* have nothing to do with one another, only with the plaintiff. In this respect the *koottu* differs from a society. Counsel referred to